IN THE

Supreme Court of the United States

October Term, 1977
No. 76-6513

WILLIE LEE BELL,

Petitioner,

vs.

THE STATE OF OHIO,

Respondent.

On Writ of Certiorari to the Supreme Court of Ohio

Brief of Amicus Curiae in Support of Respondent

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Interest of Amicus Curiae

The State of California files this amicus brief pursuant to Rule 42(4) of the Rules of the Supreme Court of the United States. The People of the State of California have a vital interest in one of the questions presented by the petitioner and amicus in his support.[1]

[1]Amicus herein recognizes that the grant of certiorari in this case was limited to the first question presented in the petition (App. p. 165), *i.e.*, whether the imposition of the sentence of death for the crime of aggravated murder under the laws of the State of Ohio violates the protection against cruel and unusual punishment secured to all persons by the Eighth and Fourteenth Amendments to the Constitution of the United States. (Petn. for Cert. p. 5.) However, an examination of Appendix A to this Amicus Brief will reveal that California's death penalty statute differs from the Ohio procedure in most of the respects brought into question in this matter. As to the arguments directed to the Ohio procedure, except the matter of appellate review, California will rely on the arguments presented in Respondent's Brief.

This question implicates the review procedure provided in the Ohio capital sentencing system.

The alleged vice in the Ohio system in this respect is the "adherence" to the doctrine that the Supreme Court of Ohio will not "retry" the existence of mitigating facts, and does not reweigh the credibility of witnesses. (Petitioner's Brief p. 61.)

The Brief Amicus Curiae of the American Civil Liberties Union of Ohio Foundation, Inc. follows on the same course in Point V, pages 43-49, complaining that

> "The scope of review accorded death sentences by the Ohio Supreme Court is inadequate under the Eighth and Fourteenth Amendments to insure that a death sentence is mandated by the facts of the particular case and is *proportionate* to sentences imposed in similar cases" (emphasis added), in effect urging that proportionality review and comparison with other cases, a statutory requirement in Georgia, is constitutionally mandated.

California submits that Petitioner and his Amicus misread the cases decided by this Honorable Court in July, 1976, and we will urge that the meaningful review of which the Court spoke did not require Ohio and the other states of the Union to provide the elaborate "proportionality" review adopted in Georgia by statute.

California has been before this Honorable Court on numerous occasions over the past several years on the issue of the constitutionality of the death penalty and the procedure and occasion for its imposition.

California was before the Court as a party when *Furman* was argued (*Aikens v. California,* No. 68-

5027, reported in 403 U.S. 952). The question presented was stated, "Does the imposition and carrying out of the death penalty in this case constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments." However, *Aikens* was mooted by the intervening decision of the California Supreme Court in *People v. Anderson,* 6 Cal. 3d 628, holding that capital punishment was unconstitutional under article I, section 6 of the state Constitution in that it came within the proscription of the "cruel or unusual" clause thereof.

Following the decision in *Anderson* and this Court's decision in *Furman v. Georgia,* 408 U.S. 238, the People of the State of California, in November, 1972, by exercise of the initiative, amended the state Constitution to state that the death penalty provided in the state statutes should not be deemed to be infliction of cruel or unusual punishment within the meaning of any provision of the state Constitution. (The vote was overwhelming, 67 percent of the voters voting in favor of the initiative, 5,386,904 votes to restore the death penalty.) *See* Appendix A to California's Amicus Brief in *Gregg, et al.*

Pursuant to the People's mandate, the Legislature enacted Senate Bill 450, which became Chapter 719 of the Statutes of 1973, reinstating the death penalty for certain categories of murder and other serious crimes. (*See* Appendix B, California's Amicus Brief in *Gregg.*)

Following the decisions in *Gregg v. Georgia, et al.,* 428 U.S. 153, *et seq.* holding that capital punishment was not unconstitutional *per se,* the California Supreme Court held that the procedure for imposition of the

death penalty in California's statute did not conform to the requirements set forth in *Gregg*. *See Rockwell v. Superior Court*, 18 Cal. 3d 420.

A new statute to provide for the death penalty (*See* Appendix A, this Brief), and designated Senate Bill 155 (now Chapter 316, Statutes of 1977), was passed by both houses of the Legislature by a two-thirds vote. The governor's veto was overridden on August 11, 1977, and on the basis of an urgency clause the legislation became effective on that date.

This statute provides for the meaningful appellate review required by the opinions of this Court but it does not contemplate "proportionality" review by the State Supreme Court as is provided in the Georgia statute approved in *Gregg*.

Amicus submits this brief in support of the proposition that the procedure enacted by the Georgia Legislature is not constitutionally mandated and that Ohio and the other states of the Union may provide for adequate constitutional review without requiring the appellate court to "reweigh" the evidence, "retry" the issues or determine the "proportionality" of sentences.

It is submitted that California has adopted a procedure of appellate review in accord with the directions set forth in the plurality and concurring opinions in *Gregg*, *Proffitt*, and *Jurek*. (*See* Appendix A.)

However, it has been urged that the Georgia statutory scheme is a constitutional mandate. This argument was rejected in the California Legislature, and for good reason! *See People v. Anderson, supra,* 6 Cal. 3d 628. The California Supreme Court in *Anderson* held that the death penalty was cruel and/or unusual

punishment under the state Constitution, that it was "impermissibly" cruel and that it was "repudiated" by society. This holding required a constitutional amendment by a People's initiative to make this penal sanction available for the protection of society.[2] A reweighing of the credibility of witnesses, a retrying of the evidence and a "proportionality" review by a court of such an opinion would render the statute totally ineffective for its purpose and defeat the intent of the People expressed in the initiative.

For the reasons set forth above, the State of California will be affected by a disposition in this case of the question as to the scope of appellate review of death sentences.

Summary of Argument

The Ohio procedure for review in capital cases provides the meaningful review of sentences of death in accord with this Court's holdings and the requirements of the United States Constitution.[3]

It is not a constitutional imperative that a state legislature, or Congress, require the highest appellate court to participate in the sentencing procedure to the extent of retrying the evidence, judging of the credibility of witnesses or determining "proportionality." It is sufficient that the legislature furnish adequate

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[2]This Honorable Court is well aware of the problem faced by California. *See Gregg*, plurality opinion, page 181, noting the statewide referendum required to negate the ruling of the California court. *See also Roberts v. Louisiana, supra* (428 U.S. 325), dissenting opinion of Justice White, page 352, footnote 5.

[3]The arguments of Petitioner and his Amicus specifically directed to the Ohio appellate review procedure are answered in the Brief of Respondent and will not be repeated herein.

guidelines to the sentencing authority and permit the defense to bring before the trier of fact at the sentencing hearing whatever mitigating circumstances relating to the individual defendant that can be adduced, including the particularized nature of the crime and the particularized characteristics of the defendant.

Appellate review assures that the guidelines are followed, the sentencing authority has access to the evidence relating to the crime and the record and background of the defendant, and that the evidence considered is sufficient to support the verdict rendered. It is submitted that this is the meaningful review which the Constitution requires, that it assures that the decision to return a death penalty is not arrived at in a capricious or arbitrary fashion and that the penalty will not be wantonly and freakishly imposed.

ARGUMENT

Meaningful Review Does Not Require the Appellate Court to Determine Proportionality, Retry the Evidence, or Judge Credibility

Gregg, supra, and the companion cases held that the death penalty is *not* per se cruel and unusual punishment prohibited by the Eighth Amendment to the Constitution of the United States. Earlier cases had not confronted this question directly although many had assumed or asserted its constitutionality. (*Gregg, supra* at 168.) The *Furman* majority, of course, did not resolve this question. The basic concern of *Furman* was the arbitrary and capricious imposition of the death penalty.

> ". . . Because of the uniqueness of the death penalty, Furman held that it could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner. . . ." *Gregg v. Georgia, supra,* 428 U.S. at 188.

It was stated that the " 'Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.' . . ." *Gregg v. Georgia, supra* at 188.

For a statute to meet constitutional requirements, the capital sentencing system must allow the sentencing authority to consider mitigating circumstances. (*Jurek v. Texas,* 428 U.S. 262, 271), *i.e.,* it is necessary that " 'there be taken into account the circumstances of the offense together with the character and propensities of the offender.' " (*Gregg, supra* at 189, quoting

Pennsylvania ex rel. Sullivan v. Ashe, 302 U.S. 51, 55 [1937].)

The statute must ensure that the sentencing authority has adequate guidance to enable it to perform its function. The procedures adopted must enable the jury's attention to be focused on the particularized nature of the crime and the particularized characteristics of the individual defendant.

This Honorable Court said that it did not intend to suggest that only the Georgia procedure would be permissible under *Furman* or that any sentencing system constructed along these general lines would inevitably satisfy the concerns of *Furman,* each distinct system was to be examined on an individual basis. (*Gregg, supra* at 195.)

In discussing the Georgia procedure, the plurality opinion said of the sentencing review contained in the statute (page 166, *Gregg v. Georgia*):

> "*In addition* to the conventional appellate process available in all criminal cases, provision is made for special expedited direct review by the Supreme Court of Georgia of the appropriateness of imposing the sentence of death in the particular case. . . ." (Emphasis added.)

The opinion of the plurality in *Gregg, supra* (p. 204), said, "Finally, the Georgia statute has an *additional* provision designed to assure that the death penalty will not be imposed on a capriciously selected group of convicted defendants. . . ." (emphasis added), and a discussion of the statutory provisions for review and the practice in Georgia followed. The plurality opinion concluded with a summary of the Georgia sentencing

system and with a reference to the review provisions as follows (p. 207):

> ". . . *In addition,* the review function of the Supreme Court of Georgia affords *additional* assurance that the concerns that prompted our decision in Furman are not present to any significant degree in the Georgia procedure applied here." (Emphasis added.)

The Court did *not* state that the meaningful appellate review required of a constitutionally adequate statute could not be available through the conventional appellate process which secures compliance with the evidentiary and procedural demands of *Furman* and *Gregg, et al.*

The Texas procedure for capital sentencing, upheld in *Jurek* (428 U.S. 262), does not contemplate the retrying on appeal of the evidence presented at the penalty phase nor does it permit a "tinkering" on appeal with the judgment and sentence rendered. The test to be applied is whether proper evidence was presented to the jury to enable it to make its decision on the three questions required to be answered in the affirmative at the penalty phase and the legal sufficiency of such evidence to support the conclusions drawn.

See

Jurek v. State, 522 S.W.2d 934 (*affd. Jurek v. Texas,* 428 U.S. 262, 277);

Gholson v. State, 542 S.W.2d 395, 398 (*cert. denied,* June 20, 1977, 97 S.Ct. 2960);

Moore v. State, 542 S.W.2d 664 at 676 (*cert. denied,* May 31, 1977, 97 S.Ct. 2666);

Boulware v. State, 542 S.W.2d 677 (*cert. denied,* April 4, 1977, 97 S.Ct. 1610-11);

White v. State, 543 S.W.2d 104 (*cert. denied,* April 25, 1977, 97 S.Ct. 1689).

In *Moore, supra* at 676, the Texas Court of Criminal Appeals specifically held that the testimony offered at the penalty stage, as well as at the guilt stage, was *sufficient* to sustain the jury's answer of "yes" to the second issue submitted at the penalty stage of the trial.

See also

Collins v. State, 548 S.W.2d 368 (*cert. denied,* April 4, 1977, 97 S.Ct. 1611).

In *Jurek, supra* at 273, this Court noted that in the case of *Smith v. State,* No. 49,809, the appellate court examined the *sufficiency* of the evidence to see if the "yes" answer to question 2 should be sustained. *See Smith v. State,* 540 S.W.2d 693, 697 (on appellant's motion for rehearing).

As the plurality opinion in *Jurek, supra* said at 276:

> "We conclude that Texas' capital-sentencing procedures, like those of Georgia and Florida, do not violate the Eighth and Fourteenth Amendments. By narrowing its definition of capital murder, Texas has essentially said that there must be at least one statutory aggravating circumstance in a first-degree murder case before a death sentence may even be considered. By authorizing the defense to bring before the jury at the separate sentencing hearing whatever mitigating circumstances relating to the individual defendant can be adduced, Texas has ensured that the sentencing

> jury will have adequate guidance to enable it to perform its sentencing function. ***By providing prompt judicial review of the jury's decision in a court with statewide jurisdiction, Texas has provided a means to promote the evenhanded, rational, and consistent imposition of death sentences under law.*** Because this system serves to assure that sentences of death will not be 'wantonly' or 'freakishly' imposed it does not violate the Constitution." (Emphasis added.) ***Jurek v. Texas,*** 428 U.S. at 276.

Texas cases thus reflect that the appellate review contemplated was of the sufficiency of the evidence to support the finding of the sentencing authority of the questions required to be affirmatively answered in the penalty hearing phase. *E.g., see Moore v. State, supra* (542 S.W.2d 664, 676).

In Florida, the statute does not provide for a proportionality review and although language used in the leading case (*State v. Dixon,* 283 So.2d 1) might indicate that such review is undertaken, an examination of the majority of the cases reversed by the Florida Supreme Court will reveal that in those cases the trial judge had refused to follow the jury's recommendation of life and had imposed the death sentence.

The rule developed in Florida is that the recommendation of the advisory jury should weigh heavily in the determination of the sentence.

Lamadline v. State, 303 So.2d 17;

McCaskill v. State, 344 So.2d 1276 at 1280.

In *Tedder v. State,* 322 So.2d 908, the Florida Supreme Court said that to sustain a death sentence where the jury has recommended life the facts sug-

gesting a sentence of death must be so clear and convincing that no reasonable person could disagree.

Dobbert v. State, 328 So.2d 433 is an example of an affirmance by the Florida Supreme Court of a death sentence imposed by a trial judge after a jury had recommended a life sentence. The State Supreme Court found that, considering the mitigating and aggravating circumstances and after a careful review of the entire record, the trial judge properly imposed the death penalty for the murder conviction. (P. 441.)

In affirming the judgment and rejecting an *ex post facto* claim, this Honorable Court in *Dobbert v. Florida,* ..... U.S. ....., 97 S.Ct. 2290, discussed the review accorded by the Florida Supreme Court in this situation and noted the new procedure used to review a trial court's rejection of a jury's recommendation of life, stating the *Tedder* rule as follows (at p. 2299):

> " 'In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be *so clear and convincing that virtually no reasonable person could differ.*' " (Emphasis in opinion of the Court.)

This Court said that this review was by no means perfunctory and that this statute afforded significantly more safeguards than the old Florida statute. In sustaining the affirmance of the judgment imposing death after a jury recommendation of life, this Court noted that there were obvious and substantial aggravating factors in support of the trial judge's determination.

In *Proffitt* (428 U.S. 242), the plurality acknowledged that it was true that the Florida Supreme Court

had not chosen to formulate a rigid objective test as its standard of review for all cases. However, this Court said that it does not follow that the appellate review process was ineffective or arbitrary. (*Proffitt v. Florida,* 428 U.S. at 242.) This Court concluded (at pages 259-60),

> "Florida, like Georgia, has responded to Furman by enacting legislation that passes constitutional muster. That legislation provides that after a person is convicted of first-degree murder, there shall be an informed, focused, guided, and objective inquiry into the question whether he should be sentenced to death. If a death sentence is imposed, the sentencing authority articulates in writing the statutory reasons that led to its decision. Those reasons, and the evidence supporting them, are conscientiously reviewed by a court which, because of its statewide jurisdiction, can assure consistency, fairness, and rationality in the evenhanded operation of the state law. As in Georgia, this system serves to assure that sentences of death will not be 'wantonly' or 'freakishly' imposed. See Furman v. Georgia, 408 U.S., at 310 (Stewart, J. concurring). Accordingly, the judgment before us is affirmed."

See Proffitt v. State, 315 So.2d 461, 466-67; and *see Cooper v. State,* 336 So.2d 1133 (*cert. denied,* May 16, 1977, 97 S.Ct. 2200), in which the Florida Supreme Court affirmed a judgment where it found that the trial judge, in imposing the death penalty after a jury had so advised, had considered proper evidence in concluding that there were no mitigating circumstances and so there was no basis to reverse his conclusions.

In *Gardner v. Florida,* ..... U.S. ....., 97 S.Ct. 1197, this Court said that in order for the state to administer its sentencing procedures with an even hand, it is important that the record on appeal disclose to the reviewing court the considerations which motivated the death sentence in every case in which it is imposed, *i.e.,* that review of a death sentence imposes a duty to consider the total record. It is significant that rather than remanding the case to the Florida Supreme Court for disposition, the matter was remanded with directions to order further proceedings at the trial court level where the trial judge had refused to follow the advisory verdict of the jury and had imposed a death sentence, partially on a pre-sentence report, portions of which were not disclosed to defense counsel.

Appellate review of sentences has been the source of debate over the years. However, the various states should be permitted to experiment in this area and to make their own decision to adopt such procedure, wholly or partially, to meet the needs of the particular jurisdiction.

> *See* Standards Relating to Appellate Review of Sentences, ABA Project on Standards for Criminal Justice; 32 F.R.D. 249, 257.

The legislatures of the various states may choose not to have the evidence presented to the sentencing authorities "reweighed" by a judicial body that has not heard the evidence, or permit the credibility of witnesses to be "judged" by judges who have not heard them, or permit a judicial body that has already decided that the punishment imposed is "impermissive" and "repudiated" to determine "proportionality."

Gregg and *Furman* require that decisions to impose the death penalty are not made capriciously and arbi-

trarily. In order to avoid the wanton and freakish verdicts decreeing this punishment this Court required that the body charged with the determination of the sentence be provided with guidance and afforded access to information to be considered in arriving at the sentence, including the circumstances of the crime and the background of the defendant.

Meaningful review is needed to assure that the guidance is given and the evidence crucial in determining whether the defendant will die or live is presented to the jury. Where the sentencing authority is required to specify the factors relied on meaningful review is available to assure that no arbitrariness or capriciousness exists. This review should be prompt, before a body with statewide jurisdiction, and, as this Court said this term, on a complete record.

The Constitution does *not* require that the state provide "proportionality" review in its highest court nor that that body "tinker" with the sentence.

Conclusion

It is submitted that Ohio affords the meaningful appellate review in capital cases in accord with this Court's opinions and the Constitution.

Respectfully submitted,

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APPENDIX A

Senate Bill No. 155

CHAPTER 316

An act to amend Section 1672 of the Military and Veterans Code, to amend Sections 37, 128, 209, 219, 1018, 1050, 1103, 1105, 4500, and 12310 of, to repeal Sections 190, 190.1, 190.2, and 190.3 of, and to add Sections 190, 190.1, 190.2, 190.3, 190.4, 190.5, and 190.6 to, the Penal Code, relating to punishment for crimes, and declaring the urgency thereof, to take effect immediately.

[Passed over Governor's veto August 11, 1977.
Filed with Secretary of State August 11, 1977.]

LEGISLATIVE COUNSEL'S DIGEST

SB 155, Deukmejian. Death penalty.

Existing law provides for the imposition of the death penalty under procedures which have been invalidated by court decision because they lack provision for consideration of mitigating circumstances.

This bill would make such a mitigating circumstances provision in the law, as to certain crimes formerly subject only to the death penalty, and would impose life imprisonment without parole rather than death or life imprisonment with parole in other cases.

This bill would also define the proof necessary to prove murder involving the infliction of torture to require proof of intent to inflict extreme and prolonged pain, and would define the proof necessary to prove that the defendant aided or committed an act causing death to require proof that the defendant's conduct was an assault or battery or involved an order, initiation, or coercion of the killing.

The bill would provide that certain of its provisions would become operative only until the operative date of A.B. 513, if later than the operative date of this bill.

The bill would take effect immediately as an urgency statute.

The people of the State of California do enact as follows:

SECTION 1. Section 1672 of the Military and Veterans Code is amended to read:

1672. Any person who is guilty of violating Section 1670 or 1671 is punishable as follows:

(a) If his act or failure to act causes the death of any person, he is punishable by death or imprisonment in the state prison for life without possibility of parole. The penalty shall be determined pursuant to the provisions of Sections 190.3 and 190.4 of the Penal Code. If the act or failure to act causes great bodily injury to any person, a person violating this section is punishable by life imprisonment without possibility of parole.

(b) If his act or failure to act does not cause the death of, or great bodily injury to, any person, he is punishable by imprisonment in the state prison for not more than 20 years, or a fine of not more than ten thousand dollars ($10,000) or both. However, if such person so acts or so fails to act with the intent to hinder, delay, or interfere with the preparation of the United States or of any state for defense or for war, or with the prosecution of war by the United States, or with the rendering of assistance by the United States to any other nation in connection with that nation's defense, the minimum punishment shall be

imprisonment in the state prison for not less than one year, and the maximum punishment shall be imprisonment in the state prison for not more than 20 years, or by a fine of not more than ten thousand dollars ($10,000), or both.

SEC. 2. Section 37 of the Penal Code is amended to read:

37. Treason against this state consists only in levying war against it, adhering to its enemies, or giving them aid and comfort, and can be committed only by persons owing allegiance to the state. The punishment of treason shall be death or life imprisonment without possibility of parole. The penalty shall be determined pursuant to Sections 190.3 and 190.4.

SEC. 3. Section 128 of the Penal Code is amended to read:

128. Every person who, by willful perjury or subornation of perjury procures the conviction and execution of any innocent person, is punishable by death or life imprisonment without possibility of parole. The penalty shall be determined pursuant to Sections 190.3 and 190.4.

SEC. 4. Section 190 of the Penal Code is repealed.

SEC. 5. Section 190 is added to the Penal Code, to read:

190. Every person guilty of murder in the first degree shall suffer death, confinement in state prison for life without possibility of parole, or confinement in state prison for life. The penalty to be applied shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4, and 190.5. Every person guilty of murder in the second degree is punishable by im-

prisonment in the state prison for five, six, or seven years.

SEC. 6. Section 190.1 of the Penal Code is repealed.

SEC. 7. Section 190.1 is added to the Penal Code, to read:

190.1. A case in which the death penalty may be imposed pursuant to this chapter shall be tried in separate phases as follows:

(a) The defendant's guilt shall first be determined. If the trier of fact finds the defendant guilty of first degree murder, it shall at the same time determine the truth of all special circumstances charged as enumerated in Section 190.2, except for a special circumstance charged pursuant to paragraph (5) of subdivision (c) of Section 190.2 where it is alleged that the defendant had been convicted in a prior proceeding of the offense of murder of the first or second degree.

(b) If the defendant is found guilty of first degree murder and one of the special circumstances is charged pursuant to paragraph (5) of subdivision (c) of Section 190.2 which charges that the defendant had been convicted in a prior proceeding of the offense of murder of the first or second degree, there shall thereupon be further proceedings on the question of the truth of such special circumstance.

(c) If the defendant is found guilty of first degree murder and one or more special circumstances as enumerated in Section 190.2 has been charged and found to be true, his sanity on any plea of not guilty by reason of insanity under Section 1026 shall be determined as provided in Section 190.4. If he is found to be sane, there shall thereupon be further proceedings on the question of the penalty to be imposed. Such

proceedings shall be conducted in accordance with the provisions of Sections 190.3 and 190.4.

SEC. 8. Section 190.2 of the Penal Code is repealed.

SEC. 9. Section 190.2 is added to the Penal Code, to read:

190.2. The penalty for a defendant found guilty of murder in the first degree shall be death or confinement in the state prison for life without possibility of parole in any case in which one or more of the following special circumstances has been charged and specially found, in a proceeding under Section 190.4, to be true:

(a) The murder was intentional and was carried out pursuant to agreement by the person who committed the murder to accept a valuable consideration for the act of murder from any person other than the victim;

(b) The defendant, with the intent to cause death, physically aided or committed such act or acts causing death, and the murder was willful, deliberate, and premeditated, and was perpetrated by means of a destructive device or explosive;

(c) The defendant was personally present during the commission of the act or acts causing death, and with intent to cause death physically aided or committed such act or acts causing death and any of the following additional circumstances exists:

(1) The victim is a peace officer as defined in Section 830.1, subdivision (a) or (b) of Section 830.2, subdivision (a) or (b) of Section 830.3, or subdivision (b) of Section 830.5, who, while engaged in the performance of his duty was intentionally killed, and the defendant knew or reasonably should have known that

such victim was a peace officer engaged in the performance of his duties.

(2) The murder was willful, deliberate, and premeditated; the victim was a witness to a crime who was intentionally killed for the purpose of preventing his testimony in any criminal proceeding; and the killing was not committed during the commission or attempted commission of the crime to which he was a witness.

(3) The murder was willful, deliberate, and premeditated and was committed during the commission or attempted commission of any of the following crimes:

(i) Robbery in violation of Section 211;

(ii) Kidnapping in violation of Section 207 or 209. Brief movements of a victim which are merely incidental to the commission of another offense and which do not substantially increase the victim's risk of harm over that necessarily inherent in the other offense do not constitute a violation of Section 209 within the meaning of this paragraph.

(iii) Rape by force or violence in violation of subdivision (2) of Section 261; or by threat of great and immediate bodily harm in violation of subdivision (3) of Section 261;

(iv) The performance of a lewd or lascivious act upon the person of a child under the age of 14 years in violation of Section 288;

(v) Burglary in violation of subdivision (1) of Section 460 of an inhabited dwelling house with an intent to commit grand or petit larceny or rape.

(4) The murder was willful deliberate, and premeditated, and involved the infliction of torture. For purposes of this section, torture requires proof of an intent to inflict extreme and prolonged pain.

(5) The defendant has in this proceeding been convicted of more than one offense of murder of the first or second degree, or has been convicted in a prior proceeding of the offense of murder of the first or second degree. For the purpose of this paragraph an offense committed in another jurisdiction which if committed in California would be punishable as first or second degree murder shall be deemed to be murder in the first or second degree.

(d) For the purposes of subdivision (c), the defendant shall be deemed to have physically aided in the act or acts causing death only if it is proved beyond a reasonable doubt that his conduct constitutes an assault or a battery upon the victim or if by word or conduct he orders, initiates, or coerces the actual killing of the victim.

SEC. 10. Section 190.3 of the Penal Code is repealed.

SEC. 11. Section 190.3 is added to the Penal Code, to read:

190.3. If the defendant has been found guilty of murder in the first degree, and a special circumstance has been charged and found to be true, or if the defendant may be subject to the death penalty after having been found guilty of violating subdivision (a) of Section 1672 of the Military and Veterans Code, or Section 37, 128, 219 or 4500 of this code, the trier of fact shall determine whether the penalty shall be death or life imprisonment without possibility of parole. In the proceedings on the question of penalty, evidence may be presented by both the people and the defendant as to any matter relevant to aggravation, mitigation, and sentence, including, but not limited to, the nature and circumstances of the present offense,

the presence or absence of other criminal activity by the defendant which involved the use or attempted use of force or violence or which involved the expressed or implied threat to use force or violence, and the defendant's character, background, history, mental condition and physical condition.

However, no evidence shall be admitted regarding other criminal activity by the defendant which did not involve the use or attempted use of force or violence or which did not involve the expressed or implied threat to use force or violence. As used in this section, criminal activity does not require a conviction.

However, in no event shall evidence of prior criminal activity be admitted for an offense for which the defendant was prosecuted and was acquitted. The restriction on the use of this evidence is intended to apply only to proceedings conducted pursuant to this section and is not intended to affect statutory or decisional law allowing such evidence to be used in other proceedings.

Except for evidence in proof of the offense or special circumstances which subject a defendant to the death penalty, no evidence may be presented by the prosecution in aggravation unless notice of the evidence to be introduced has been given to the defendant within a reasonable period of time, as determined by the court, prior to the trial. Evidence may be introduced without such notice in rebuttal to evidence introduced by the defendant in mitigation.

In determining the penalty the trier of fact shall take into account any of the following factors if relevant:

(a) The circumstances of the crime of which the defendant was convicted in the present proceeding and

the existence of any special circumstances found to be true pursuant to Section 190.1.

(b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the expressed or implied threat to use force or violence.

(c) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(d) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.

(e) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct.

(f) Whether or not the defendant acted under extreme duress or under the substantial domination of another person.

(g) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or the effects of intoxication.

(h) The age of the defendant at the time of the crime.

(i) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

(j) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.

After having heard and received all of the evidence, the trier of fact shall consider, take into account and be guided by the aggravating and mitigating circumstances referred to in this section, and shall determine whether the penalty shall be death or life imprisonment without the possibility of parole.

SEC. 12. Section 190.4 is added to the Penal Code, to read:

190.4. (a) Whenever special circumstances as enumerated in Section 190.2 are alleged and the trier of fact finds the defendant guilty of first degree murder, the trier of fact shall also make a special finding on the truth of each alleged special circumstance. The determination of the truth of any or all of the special circumstances shall be made by the trier of fact on the evidence presented at the trial or at the hearing held pursuant to subdivison (b) of Section 190.1.

In case of a reasonable doubt as to whether a special circumstance is true, the defendant is entitled to a finding that it is not true. The trier of fact shall make a special finding that each special circumstance charged is either true or not true. Wherever a special circumstance requires proof of the commission or attempted commission of a crime, such crime shall be charged and proved pursuant to the general law applying to the trial and conviction of the crime.

If the defendant was convicted by the court sitting without a jury, the trier of fact shall be a jury unless a jury is waived by the defendant and by the people, in which case the trier of fact shall be the court. If the defendant was convicted by a plea of guilty the trier of fact shall be a jury unless a jury is waived by the defendant and by the people.

If the trier of fact finds that any one or more of the special circumstances enumerated in Section 190.2 as charged is true, there shall be a separate penalty hearing, and neither the finding that any of the remaining special circumstances charged is not true, nor if the trier of fact is a jury, the inability of the jury to agree on the issue of the truth or untruth of any of the remaining special circumstances charged, shall prevent the holding of the separate penalty hearing.

In any case in which the defendant has been found guilty by a jury, and the jury has been unable to reach a unanimous verdict that one or more of the special circumstances charged are true, and does not reach a unanimous verdict that all the special circumstances charged are not true, the court shall dismiss the jury and shall order a new jury impaneled to try the issues, but the issue of guilt shall not be tried by such jury, nor shall such jury retry the issue of the truth of any of the special circumstances which were found by a unanimous verdict of the previous jury to be untrue. If such new jury is unable to reach the unanimous verdict that one or more of the special circumstances it is trying are true, the court shall dismiss the jury and impose a punishment of confinement in state prison for life.

(b) If defendant was convicted by the court sitting without a jury, the trier of fact at the penalty hearing shall be a jury unless a jury is waived by the defendant and the people, in which case the trier of fact shall be the court. If the defendant was convicted by a plea of guilty, the trier of fact shall be a jury unless a jury is waived by the defendant and the people.

If the trier of fact is a jury and has been unable to reach a unanimous verdict as to what the penalty shall be, the court shall dismiss the jury and impose a punishment of confinement in state prison for life without possibility of parole.

(c) If the trier of fact which convicted the defendant of a crime for which he may be subjected to the death penalty was a jury, the same jury shall consider any plea of not guilty by reason of insanity pursuant to Section 1026, the truth of any special circumstances which may be alleged, and the penalty to be applied, unless for good cause shown the court discharges that jury in which case a new jury shall be drawn. The court shall state facts in support of the finding of good cause upon the record and cause them to be entered into the minutes.

(d) In any case in which the defendant may be subjected to the death penalty, evidence presented at any prior phase of the trial, including any proceeding upon a plea of not guilty by reason of insanity pursuant to Section 1026, shall be considered at any subsequent phase of the trial, if the trier of fact of the prior phase is the same trier of fact at the subsequent phase.

(e) In every case in which the trier of fact has returned a verdict or finding imposing the death penalty, the defendant shall be deemed to have made an application for modification of such verdict or finding pursuant to subdivison (7) of Section 1181. In ruling on the application the judge shall review the evidence, consider, take into account, and be guided by the aggravating and mitigating circumstances referred to in Section 190.3, and shall make an independent determination as to whether the weight of the evidence supports

the jury's findings and verdicts. He shall state on the record the reason for his findings.

The judge shall set forth the reasons for his ruling on the application and direct that they be entered on the Clerk's minutes.

The denial of the modification of a death penalty verdict pursuant to subdivison (7) of Section 1181 shall be reviewed on the defendant's automatic appeal pursuant to subdivision (b) of Section 1239. The granting of the application shall be reviewed on the peoples appeal pursuant to paragraph (6) of subdivision (a) of Section 1238.

The proceedings provided for in this subdivison are in addition to any other proceedings on a defendant's application for a new trial.

SEC. 13. Section 190.5 is added to the Penal Code, to read:

190.5. (a) Notwithstanding any other provision of law, the death penalty shall not be imposed upon any person who is under the age of 18 years at the time of commission of the crime. The burden of proof as to the age of such person shall be upon the defendant.

(b) Except when the trier of fact finds that a murder was committed pursuant to an agreement as defined in subdivision (a) of Section 190.2, or when a person is convicted of a violation of subdivision (a) of Section 1672 of the Military and Veterans Code, or Section 37, 128, 4500, or subdivison (b) of Section 190.2 of this code, the death penalty shall not be imposed upon any person who was a principal in the commission of a capital offense unless he was personally present during the commission of the act or acts causing death,

and intentionally physically aided or committed such act or acts causing death.

(c) For the purposes of subdivision (b), the defendant shall be deemed to have physically aided in the act or acts causing death only if it is proved beyond a reasonable doubt that his conduct constitutes an assault or a battery upon the victim or if by word or conduct he orders, initiates, or coerces the actual killing of the victim.

SEC. 14. Section 190.6 is added to the Penal Code, to read:

190.6. The Legislature finds that the imposition of sentence in all capital cases should be expeditiously carried out.

Therefore, in all cases in which a sentence of death has been imposed, the appeal to the State Supreme Court must be decided and an opinion reaching the merits must be filed within 150 days of certification of the entire record by the sentencing court. In any case in which this time requirement is not met, the Chief Justice of the Supreme Court shall state on the record the extraordinary and compelling circumstances causing the delay and the facts supporting these circumstances. A failure to comply with the time requirements of this section shall not be grounds for precluding the ultimate imposition of the death penalty.

SEC. 15. Section 209 of the Penal Code is amended to read:

209. (a) Any person who seizes, confines, inveigles, entices, decoys, abducts, conceals, kidnaps or carries away any individual by any means whatsoever with intent to hold or detain, or who holds or detains, such individual for ransom, reward or to commit extor-

tion or to exact from relatives or friends of such person any money or valuable thing, or any person who aids or abets any such act, is guilty of a felony and upon conviction thereof shall be punished by imprisonment in the state prison for life without possibility of parole in cases in which any person subjected to any such act suffers death or bodily harm, or shall be punished by imprisonment in the state prison for life with the possibility of parole in cases where no such person suffers death or bodily harm.

(b) Any person who kidnaps or carries away any individual to commit robbery shall be punished by imprisonment in the state prison for life with possibility of parole.

SEC. 16. Section 219 of the Penal Code is amended to read:

219. Every person who unlawfully throws out a switch, removes a rail, or places any obstruction on any railroad with the intention of derailing any passenger, freight or other train, car or engine and thus derails the same, or who unlawfully places any dynamite or other explosive material or any other obstruction upon or near the track of any railroad with the intention of blowing up or derailing any such train, car or engine and thus blows up or derails the same, or who unlawfully sets fire to any railroad bridge or trestle over which any such train, car or engine must pass with the intention of wrecking such train, car or engine, and thus wrecks the same, is guilty of a felony and punishable with death or imprisonment in the state prison for life without possibility of parole in cases where any person suffers death as a proximate result thereof, or imprisonment in the state prison for

life with the possibility of parole, in cases where no person suffers death as a proximate result thereof. The penalty shall be determined pursuant to Sections 190.3 and 190.4.

SEC. 17. Section 1018 of the Penal Code is amended to read:

1018. Unless otherwise provided by law every plea must be entered or withdrawn by the defendant himself in open court. No plea of guilty of a felony for which the maximum punishment is death, or life imprisonment without the possibility of parole, shall be received from a defendant who does not appear with counsel, nor shall any such plea be received without the consent of the defendant's counsel. No plea of guilty of a felony for which the maximum punishment is not death or life imprisonment without the possibility of parole shall be accepted from any defendant who does not appear with counsel unless the court shall first fully inform him of his right to counsel and unless the court shall find that the defendant understands his right to counsel and freely waives it and then, only if the defendant has expressly stated in open court, to the court, that he does not wish to be represented by counsel. On application of the defendant at any time before judgment the court may, and in case of a defendant who appeared without counsel at the time of the plea the court must, for a good cause shown, permit the plea of guilty to be withdrawn and a plea of not guilty substituted. Upon indictment or information against a corporation a plea of guilty may be put in by counsel. This section shall be liberally construed to effect these objects and to promote justice.

SEC. 18. Section 1050 of the Penal Code is amended to read:

1050. The welfare of the people of the State of California requires that all proceedings in criminal cases shall be set for trial and heard and determined at the earliest possible time. To this end the Legislature finds that the criminal courts are becoming increasingly congested with resulting adverse consequences to the welfare of the people and the defendant. It is therefore recognized that the people and the defendant have reciprocal rights and interests in a speedy trial or other disposition, and to that end shall be the duty of all courts and judicial officers and of all counsel, both the prosecution and the defense, to expedite such proceedings to the greatest degree that is consistent with the ends of justice. In accordance with this policy, criminal cases shall be given precedence over, and set for trial and heard without regard to the pendency of, any civil matters or proceedings.

To continue any hearing in a criminal proceeding, including the trial, a written notice must be filed within two court days of the hearing sought to be continued, together with affidavits or declarations detailing specific facts showing that a continuance is necessary, unless the court for good cause entertains an oral motion for continuance. Continuances shall be granted only upon a showing of good cause. Neither a stipulation between counsel nor the convenience of the parties is in and of itself a good cause. Provided, that upon a showing that the attorney of record at the time of the defendant's first appearance in the superior court is a Member of the Legislature of this State and that the Legislature is in session or that a legislative interim committee of which the attorney is a duly appointed member is meeting or is to meet within the next seven days, the defendant shall be entitled

to a reasonable continuance not to exceed 30 days. A continuance shall be granted only for that period of time shown to be necessary by the evidence considered at the hearing on the motion. Whenever any continuance is granted, the facts proved which require the continuance shall be entered upon the minutes of the court or, in a justice court, upon the docket. Whenever it shall appear that any court may be required, because of the condition of its calendar, to dismiss an action pursuant to Section 1382 of this code, the court must immediately notify the chairman of the Judicial Council.

SEC. 19. Section 1103 of the Penal Code is amended to read:

1103. Upon a trial for treason, the defendant cannot be convicted unless upon the testimony of two witnesses to the same overt act, or upon confession in open court; nor, except as provided in Sections 190.3 and 190.4, can evidence be admitted of an overt act not expressly charged in the indictment or information; nor can the defendant be convicted unless one or more overt acts be expressly alleged therein.

SEC. 20. Section 1105 of the Penal Code is amended to read:

1105. (a) Upon a trial for murder, the commission of the homicide by the defendant being proved, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon him, unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable.

(b) Nothing in this section shall apply to or affect any proceeding under Section 190.3 or 190.4.

SEC. 21. Section 4500 of the Penal Code is amended to read:

4500. Every person undergoing a life sentence in a state prison of this state, who, with malice aforethought, commits an assault upon the person of another with a deadly weapon or instrument, or by any means of force likely to produce great bodily injury is punishable with death or life imprisonment without possibility of parole. The penalty shall be determined pursuant to the provisions of Sections 190.3 and 190.4; however, in cases in which the person subjected to such assault does not die within a year and a day after such assault as a proximate result thereof, the punishment shall be imprisonment in the state prison for life without the possibility of parole for nine years.

For the purpose of computing the days elapsed between the commission of the assault and the death of the person assaulted, the whole of the day on which the assault was committed shall be counted as the first day.

Nothing in this section shall be construed to prohibit the application of this section when the assault was committed outside the walls of any prison if the person committing the assault was undergoing a life sentence in a state prison at the time of the commission of the assault and was not on parole.

SEC. 22. Section 12310 of the Penal Code is amended to read:

12310. (a) Every person who willfully and maliciously explodes or ignites any destructive device or any explosive which causes the death of any person is guilty of a felony, and shall be punished by imprisonment in the state prison for life without the possibility of parole.

(b) Every person who willfully and maliciously explodes or ignites any destructive device or any explosive which causes mayhem or great bodily injury to any person is guilty of a felony, and shall be punished by imprisonment in the state prison for life.

SEC. 23. If any word, phrase, clause, or sentence in any section amended or added by this act, or any section or provision of this act, or application thereof to any person or circumstance, is held invalid, such invalidity shall not affect any other word, phrase, clause, or sentence in any section amended or added by this act, or any other section, provisions or application of this act, which can be given effect without the invalid word, phrase, clause, sentence, section, provision or application and to this end the provisions of this act are declared to be severable.

SEC. 24. If any word, phrase, clause, or sentence in any section amended or added by this act, or any section or provision of this act, or application thereof to any person or circumstance, is held invalid, and as a result thereof, a defendant who has been sentenced to death under the provisions of this act will instead be sentenced to life imprisonment, such life imprisonment shall be without possibility of parole. The Legislature finds and declares that those persons convicted of first degree murder and sentenced to death are deserving and subject to society's ultimate condemnation and should, therefore, not be eligible for parole which is reserved for crimes of lesser magnitude.

If any word, phrase, clause, or sentence in any section amended or added by this act, or any section or provision of this act, or application thereof to any person or circumstance is held invalid, and as a result

thereof, a defendant who has been sentenced to life imprisonment without the possibility of parole under the provisions of this act will instead be sentenced to life imprisonment with the possibility of parole.

SEC. 25. If this bill and Assembly Bill 513 are both chaptered, and both amend Section 1050 of the Penal Code, Section 18 of this act shall become operative only if this bill is chaptered and becomes operative before Assembly Bill 513, and in such event Section 18 of this act shall remain operative only until the operative date of Assembly Bill 513.

SEC. 26. This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting such necessity are:

The California Supreme Court has declared the existing death penalty law unconstitutional. This act remedies the constitutional infirmities found to be in existing law, and must take effect immediately in order to guarantee the public the protection inherent in an operative death penalty law.

Senate Bill No. 155

This bill having been returned by the Governor with his objections thereto, and, after reconsideration, having passed both Houses by the constitutional majority, has become a law this 11th day of August, 1977.

/s/ James R. Mills
Acting President of the Senate

/s/ Leo T. McCarthy
Speaker of the Assembly

Filed: In the office of the Secretary of State of the State of California.

AUG. 11 1977.

At 5:22 o'clock p.m.

MARCH FONG EU, Secretary of State
By /s/ Irene Devejian
Deputy Secretary of State